No. 17-1104

In the Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., ET AL.,

Petitioners,

v.

ROBERTA G. DEVRIES, ADMINISTRATRIX OF THE ESTATE OF JOHN B. DEVRIES, DECEASED, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., AMERICAN INSURANCE ASSOCIATION, AMERICAN TORT REFORM ASSOCIATION, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can products-liability defendants be held liable under Maritime law for injuries caused by products that they did not make, sell, or distribute?

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INTEREST OF *AMICI CURIAE*[1]

The Coalition for Litigation Justice, Inc., American Insurance Association, American Tort Reform Association, and NFIB Small Business Legal Center are organizations whose members include companies that manufactured or sold various products used in conjunction with asbestos-containing products and insurers of those companies.

Amici are concerned that if the Court holds product manufacturers liable for harms caused by *other manufacturers'* asbestos-containing products, the decision will unduly pressure the remaining solvent defendants in the asbestos litigation, including small businesses. The four decades old asbestos litigation has already bankrupted over 120 companies and shows no sign of abating. A duty finding would also open the door to lawsuits against countless companies whose products are used with other potentially hazardous products sold by third parties. Finally, other courts may be guided by the Court's decision when deciding similar cases under state common law.

The Coalition for Litigation Justice, Inc. is a nonprofit association formed by insurers in 2000 to address and improve the asbestos litigation environ-

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[1] No counsel for a party authored this brief in whole or in part; and no party, party's counsel, or other person or entity—other than the *amici* or their counsel—contributed money that was intended to fund preparing or submitting the brief. The parties have consented to the filing of the brief.

ment.[2] The Coalition has filed over 100 *amicus curiae* briefs in cases that may have a significant impact on the asbestos litigation environment.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing approximately 340 major property and casualty insurance companies. AIA members collectively underwrite more than $134 billion in direct property and casualty premiums nationwide, and range in size from small companies to the largest insurers with global operations. AIA files *amicus curiae* briefs in significant cases on issues of importance to the insurance industry and marketplace.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over three decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent

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[2] The Coalition includes Century Indemnity Company; San Francisco Reinsurance Company; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 350,000 members of NFIB own a wide variety of America's independent businesses.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Originally and for many years, the primary defendants in asbestos cases were companies that mined asbestos or manufactured friable, amphibole-containing thermal insulation. *See* James S. Kakalik et al., *Costs of Asbestos Litigation* 3 (RAND Corp. 1983).[3] Hundreds of thousands of claims were filed against the major asbestos producers, such as Johns-Manville Corp, Owens Corning Corp., and W.R. Grace & Co.[4]

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[3] *See Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 605 (N.D. Ohio 2004) ("While there is debate in the medical community over whether chrysotile asbestos is carcinogenic, it is generally accepted that it takes a far greater exposure to chrysotile fibers than to amphibole fibers to cause mesothelioma."), *aff'd sub nom. Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); *Rockman v. Union Carbide Corp.*, 266 F. Supp. 3d 839, 846 (D. Md. 2017) ("*chrysotile* asbestos is classified in an entirely separate mineralogical family from *amphibole* asbestos and is widely considered less potent."), *appeal dismissed sub nom. Rockman v. Georgia-Pacific, LLC*, 2017 WL 7135451 (4th Cir. Oct. 23, 2017).

[4] *See* James Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 237 (2006) ("As leading plaintiffs' counsel Ron Motley and Joe Rice observed some time ago, the first seventeen asbestos defendants to go into bankruptcy represented 'one-half to three-quarters of the original liability share.'"). According to RAND, "[a]pproximately 730,000 people had filed an asbestos claim through 2002." Steven J. Carroll et al., *Asbestos*

By the late 1990s, the asbestos litigation had reached such proportions that this Court noted the "elephantine mass" of cases, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999), and referred to the litigation as a "crisis." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Mass filings pressured "most of the lead defendants and scores of other companies" into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation. Steven J. Carroll et al., *Asbestos Litigation* 67 (RAND Corp. 2005).

Following a 2000-2002 wave of bankruptcies among asbestos manufacturers,[5] "plaintiffs' attorneys shifted their litigation strategy away from the traditional thermal insulation defendants and towards peripheral and new defendants...." Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations From 1991-2010*, 27-3 Mealey's Litig. Rep.: Asb. 1, 1 (Nov. 7, 2012); Carroll et al., *supra*, at xxiii (plaintiffs began to "press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.").[6] The litigation be-

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Litigation xxiv (RAND Corp. 2005). Tens of thousands of additional claims have been filed since 2002.

[5] *See* Mark D. Plevin et al., *Where Are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11-7 Mealey's Asb. Bankr. Rep. 1, Chart 1 (Feb. 2012) (there were as many asbestos-related bankruptcies from 2000-2002 as in the previous two decades combined).

[6] *See also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (2007) (the "surge of

came an "endless search for a solvent bystander," according to one plaintiff's attorney. *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17-3 Mealey's Litig. Rep.: Asb. 19 (Mar. 1, 2002) (quoting Mr. Scruggs).

The Towers Watson consulting firm has identified "more than 10,000 companies, including subsidiaries, named in asbestos litigation." Jenni Biggs et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013). Companies formerly viewed as peripheral defendants are "now bearing the majority of the costs of awards relating to decades of asbestos use." American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 3 (Aug. 2007).

In an attempt to further stretch the liability of still-solvent companies, some plaintiffs' counsel (as in this case) are promoting the theory that makers of uninsulated products in "bare metal" form should have warned about potential harms from exposure to asbestos-containing external thermal insulation manufactured and sold by third-parties and attached post-sale, such as by the Navy. Plaintiffs' lawyers are also claiming that manufacturers of products such as pumps and valves that originally came with asbestos-containing gaskets or packing should have warned about potential harms from exposure to replacement internal gaskets or packing or replace-

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bankruptcies" triggered "a search for new recruits to fill the gap in the ranks of defendants").

ment external flange gaskets manufactured and sold by third parties.[7]

Plaintiffs' lawyers are promoting this novel theory because the major asbestos producers have exited the tort system through bankruptcy and the Navy is immune. *See* Paul Riehle et al., *Product Liability for Third Party Replacement or Connected Parts: Changing Tides From the West*, 44 U.S.F. L. Rev 33, 38 (2009) ("Not content with the remedies available through bankruptcy trusts and state and federal worker compensation programs, claimants' lawyers have extended the reach of products liability law to 'ever-more peripheral defendants'" whose products may have been used by others with asbestos-containing products) (citation omitted); Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. of Trial Advoc. 1, 24-25 (2012) ("As a substitute [for bankrupt former defendants], plaintiffs seek to impose liability on solvent manufacturers for harms caused by products they never made or sold.").

Traditional tort principles do not support the duty Respondents seek here, as demonstrated by many non-asbestos cases. The proposed duty also represents unsound policy.

Further, an alternative compensation system exists to compensate Respondents for harms caused by the bankrupt former asbestos producers. To the ex-

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[7] *See* Peter Geier, *Asbestos Litigation Moves On With World War II Shipyard Cases 'Dying Off', Plaintiff Attorneys Dig Deeper to Find New Strategies*, 130:5 Recorder (San Francisco) 12 (Jan. 9, 2006).

tent Respondents' exposures to asbestos came from bankrupt companies' products, trusts established in bankruptcy provide a remedy. Maritime law's special solicitude for the safety and protection of sailors should not mean that Respondents have a tort remedy against companies for asbestos-containing products they did not make or sell.

Respondents and the Third Circuit justify their theory based on foreseeability. But courts must draw a line limiting tort liability in order to avoid the unending slippery slope that a foreseeability standard would inevitably create. *See Thing v. La Chusa*, 48 Cal. 3d 644, 659 (1989) (foreseeability, "is endless because foreseeability, like light, travels indefinitely in a vacuum."). To maintain consistency and certainty in the law, that line is logically drawn to bar liability where a plaintiff is harmed by a product that was neither made nor sold by the defendant.

Amici urge the Court to reverse the Third Circuit's decision and affirm the District Court's grant of summary judgment in favor of Petitioners.

ARGUMENT

I. TRADITIONAL TORT LAW PRINCIPLES DO NOT SUPPORT IMPOSITION OF LIABILITY FOR HARMS CAUSED BY THIRD-PARTIES

Ordinarily, manufacturers are named in asbestos cases with respect to asbestos *they* made or sold—*not* to hold them liable for products *made by others*. It is black-letter product liability law that manufacturers are not liable for harms caused by others' products in cases such as this one. *See* James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to*

Rescue Users from Risks Presented by Other, More Dangerous Products, 37 Sw. U. L. Rev. 595, 602 (2008).[8]

A manufacturer's ability to foresee that its product may be used in conjunction with a third-party's product does not turn the manufacturer into an insurer for harms caused by the other's product. Otherwise, a manufacturer would "be required to perform a watchdog function in order to rescue product users from risks it had no active part in creating and over which it cannot exert meaningful control." *Id.* at 601.

In a maritime asbestos personal injury case like this one, the Sixth Circuit Court of Appeals held that a manufacturer "cannot be held responsible for the asbestos contained in another product." *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488, 496 (6th Cir. 2005). The court explained, "[t]his form of guilt by association has no support in the law of

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[8] *See also* 63A *Am. Jur. 2d Products Liability* § 1027 ("The manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products. The law generally does not require a manufacturer to study and analyze the products of others and warn users of the risks of those products. Consequently, even where the manufacturer erroneously omits warnings, the most the manufacturer could reasonably be expected to foresee is that consumers might be subject to the risks of the manufacturer's own product, since those are the only risks the manufacturer is required to know. The manufacturer is not required to warn of dangers posed by use of another manufacturer's product in the same vicinity as its product was used."); *McNair v. Johnson & Johnson*, 2018 WL 2186550, at *5 (W. Va. May 11, 2018) ("[r]equiring the defendant in a products liability case to be either the manufacturer or the seller of the product is the majority rule in this country").

products liability." *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 381 (6th Cir. 2001). The Ninth Circuit in *Boyd v. Warren Pumps, LLC*, 654 F. App'x 875, 877 (9th Cir. 2016), has held that pump manufacturers "may be held liable only for [a sea captain's] exposure to asbestos-containing products that were either manufactured or supplied by them." In *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1174 (9th Cir. 2016), a maritime general negligence case against shipbuilders, the Ninth Circuit held that a sailor had to demonstrate exposure to asbestos from materials installed by the defendants to have a claim against them.[9]

In another case, the California Supreme Court explained, "we have never held that a manufacturer's duty to warn extends to hazards arising exclusively from *other* manufacturers' products." *O'Neil v. Crane Co.*, 266 P.3d 987, 997 (Cal. 2012). The court concluded, "expansion of the duty of care as urged would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law." *Id.* at 1007.

The Washington Supreme Court has said there is "little to no support . . . for extending the duty to

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[9] *See also Cabasug v. Crane Co.*, 989 F. Supp. 2d 1027, 1041 (D. Haw. 2013); *Stallings v. Georgia-Pacific Corp.*, 2015 WL 7258518, at *4 (W.D. Ky. Nov. 17, 2015); *Nelson v. Air & Liquid Sys. Corp.*, 2014 WL 6982476, at *13 (W.D. Wash. Dec. 9, 2014); *Oneal v. Alfa Laval, Inc.*, 2014 WL 5341878, at *5 (S.D. Fla. Oct. 19, 2014); *Vedros v. Northrop Grumman Shipbuilding, Inc.*, 2014 WL 1093678, at *3 (E.D. La. Mar. 14, 2014); *Crews v. Air & Liquid Sys. Corp.*, 2014 WL 639685, at *5 (N.D.N.Y. Feb. 18, 2014).

warn to another manufacturer's product." *Simonetta v. Viad Corp.*, 197 P.3d 127, 132-33 (Wash. 2008). The court held that a manufacturer is not liable for failure to warn of the danger of exposure to asbestos in insulation applied to its products if it did not manufacture the insulation. In *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008), the court rejected failure to warn claims against pump and valve manufacturers for harm caused by asbestos-containing replacement packing and replacement gaskets made by third-parties.[10]

The "prevailing majority rule" is that a manufacturer "cannot be liable for a third party's asbestos materials used with its products, where the . . . manufacturer was not in the chain of distribution of such asbestos-containing materials." *Morgan v. Bill Vann Co., Inc.*, 969 F. Supp. 2d 1358, 1366 (S.D. Ala. 2013); *Dalton v. 3M Co.*, 2013 WL 4886658, at *10

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[10] *See also Grant v. Foster Wheeler, LLC*, 140 A.3d 1242, 1248 (Me. 2016) (summary judgment affirmed where plaintiff did not demonstrate exposure to asbestos-containing products originating with defendants); *Whiting v. CBS Corp.*, 982 N.E.2d 1224 (Table) (Mass. Ct. App. 2013) (affirming summary judgment to manufacturers of turbines, pumps, valves, and pipes covered with insulation made by a third party); *Toole v. Georgia-Pacific, LLC*, 2011 WL 7938847, at *7 (Ga. Ct. App. 2011) ("[A]n asbestos victim must present evidence that he was exposed to a defendant's products."); *Moss v. Trane U.S., Inc.*, 2016 WL 916435, at *1 (W.D. Wis. Mar. 10, 2016) (defendant not liable for injuries "caused by products [its predecessor] did not manufacture, distribute or specify be used"); *Robinson v. Flowserve*, 2015 WL 11622965, at *11 (D. Wyo. Oct. 9, 2015) ("the Wyoming Supreme Court would adopt the bare metal defense and hold that manufacturers are not strictly liable for aftermarket replacement parts that the manufacturer did not manufacture or supply").

(D. Del. Sept. 12, 2013) ("The majority of courts . . . refuse to impose liability upon manufacturers for the dangers associated with asbestos-containing products manufactured and distributed by other entities."), *report and recommendation adopted*, 2013 WL 5486813 (D. Del. Oct. 1, 2013).[11]

Courts that have broadened the traditional duty to warn in some situations (as the Third Circuit did below) justify their radical expansion of liability based on *foreseeability*. The approach is geared to make *someone* pay, even if that someone was not the source of the exposure that caused the harm. *See Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) ("Deep-pocket jurisprudence is law without principle.").

Foreseeability considerations guide manufacturers as to when they must take safety measures with respect to their *own* products, not to hold them responsible for others' products. As the California Supreme Court explained, "manufacturers, distributors, and retailers have a duty to ensure the safety of their products . . . we have never held that these responsibilities extend to preventing injuries caused by *other* products that might foreseeably be used in conjunction with a defendant's product." *O'Neil*, 266 P.3d at 991 (emphasis in original). The Washington Supreme Court said in *Braaten*, "whether the manufacturers knew replacement parts would or might contain asbestos makes no difference because such

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[11] *See also* Mark A. Behrens & Margaret Horn, *Liability for Asbestos-Containing Connected or Replacement Parts Made by Third Parties: Courts Are Properly Rejecting this Form of Guilt by Association*, 37 Am. J. Trial Advoc. 489 (2014).

knowledge does not matter, as we held in *Simonetta*." 198 P.3d at 500 (citing *Simonetta*, 197 P.3d at 136).

Courts in non-asbestos cases have refused to impose liability on manufacturers of products used in conjunction with harm-causing products made by others. For example, in *Brown v. Drake-Willock International, Ltd.*, 530 N.W.2d 510 (Mich. App. 1995), a Michigan appellate court held that dialysis machine manufacturers owed no duty to warn hospital employees of the risk of exposure to formaldehyde supplied by another company even though the dialysis machine manufacturers had recommended the use of formaldehyde to clean their machines. The court held: "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Id.* at 515.

Courts have reached similar conclusions in other types of cases. For example, a pickup truck manufacturer had no duty to warn consumers against improper installation of aftermarket equipment, *see Westchem Agric. Chems. v. Ford Motor Co.*, 990 F.2d 426, 432 (8th Cir. 1993); an airplane manufacturer was not liable for passengers' circulatory problems caused by seats made by a third-party and installed post-sale, *see In re Deep Vein Thrombosis*, 356 F. Supp. 2d 1055, 1068 (N.D. Cal. 2005); a manufacturer of electrically powered lift motors used in conjunction with scaffolding equipment had no duty to warn of risks created by scaffolding made by others, *see Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986); a truck cab and chassis manufacturer was not liable when a dump bed and hoist made by a third-party post-sale caused an injury, *see Shaw v.*

Gen. Motors Corp., 727 P.2d 387, 390 (Colo. App. 1986); a crane manufacturer had no duty to warn about rigging it did not place in the stream of commerce, *see Walton v. Harnischfeger*, 796 S.W.2d 225, 226 (Tex. App. 1990); a hydraulic valve manufacturer was not liable for a defective log splitter used in conjunction with its product, *see Childress v. Gresen Mfg. Co.*, 888 F.2d 45, 46, 49 (6th Cir. 1989); a manufacturer of a paint sprayer was not liable when a solvent sold by a third-party to clean the sprayer burned a user, *see Dreyer v. Exel Indus., S.A.*, 326 F. App'x 353, 358 (6th Cir. 2009); a metal forming equipment manufacturer was not liable for a defective wood planking used in conjunction with its product, *see Toth v. Econ. Forms Corp.*, 571 A.2d 420, 423 (Pa. Super. Ct. 1990); and a manufacturer of a garbage packer mounted on a truck chassis was not liable for a defect in a chassis made by a third-party, *see Sanders v. Ingram Equip., Inc.*, 531 So. 2d 879, 880 (Ala. 1988).

Courts in non-asbestos cases also have refused to impose liability on manufacturers for harms caused by replacement parts sold by third-parties. For example, in *Baughman v. General Motors Corp.*, 780 F.2d 1131 (4th Cir. 1986), the Fourth Circuit, applying South Carolina law, refused to hold a truck manufacturer liable for a tire mechanic's injuries when a tire mounted on a replacement wheel rim assembly exploded.[12] The plaintiff contended that even though the vehicle's manufacturer did not place the re-

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[12] *See Harris v. Ajax Boiler, Inc.*, 2014 WL 3101941, at *5 (W.D.N.C. July 7, 2014) (finding *Baughman* to be "persuasive" on the lack of a duty to warn about asbestos-containing products from third-parties).

placement wheel into the stream of commerce, the vehicle was nevertheless defective because the manufacturer failed to adequately warn of dangers with similar wheels sold by others. The court said, "[t]he duty to warn must properly fall upon the manufacturer of the replacement component part." *Id.* at 1333. The court explained:

> Where, as here, the defendant manufacturer did not incorporate the defective component part into its finished product and did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had the opportunity to test, evaluate, and inspect the component; it has derived no benefit from its sale; and it has not represented to the public that the component part is its own.

Id. at 1132-33 (emphasis added).[13]

In *Fleck v. KDI Sylvan Pools*, 981 F.2d 107, 118 (3d Cir. 1992), the Third Circuit, applying Pennsylvania law, held that it would be "unreasonable" to impose liability on a swimming pool manufacturer for injuries sustained by a diver as a result of a lack of depth markers and warnings on a replacement pool liner made by another manufacturer.

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[13] *See also Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608 (Tex. 1996); *Acoba v. Gen. Tire, Inc.*, 986 P.2d 288 (Haw. 1999); *Zambrana v. Standard Oil Co. of Cal.*, 26 Cal. App. 3d 209 (1972); *Wiler v. Firestone Tire & Rubber Co.*, 95 Cal. App. 3d 621 (1979); *Lytell v. Goodyear Tire & Rubber Co.*, 439 So. 2d 542 (La. Ct. App. 1983); *Spencer v. Ford Motor Co.*, 367 N.W.2d 393 (Mich. Ct. App. 1985); *Cousineau v. Ford Motor Co.*, 363 N.W.2d 721 (Mich. Ct. App. 1985); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465 (11th Cir. 1993).

The weak foundation for the Third Circuit's duty theory is further exposed by the fact that some courts adopting the duty in asbestos cases appear not to embrace it in non-asbestos cases.[14] The rulings are just the latest example of courts improperly applying special results-oriented rules to asbestos cases instead of treating such actions like other product liability cases.[15]

The Court should reject Respondents' invitation to twist maritime tort law. As one commentator explained:

> Asbestos litigation, over the decades, has taken products liability substantive law, case handling procedures, trial practice and evidence well beyond then-existing frontiers. Responsive to creative, persuasive and resourceful claimants' counsel, sensitive to the plight of numerous seriously injured plaintiffs, fearful of clogged court dockets and institutional paralysis, many courts rushed headlong

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[14] *Compare Matter of New York City Asbestos Litig. (Dummitt v. Crane Co.) and Matter of Eighth Jud. Dist. Asbestos Litig. (Suttner v. Crane Co.)*, 59 N.E.3d 458 (N.Y. 2016), *with Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992); *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984 (Md. 2015), *with Ford Motor Co. v. Wood*, 703 A.2d 1315 (Md. Ct. Spec. App. 1998), *abrogated on other grounds, John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002).

[15] *See* S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. Mem. L. Rev. 559, 566 (2012) (because of relaxed evidentiary requirements applied by some courts earlier in the asbestos litigation, "many claims that would not be compensable in typical personal injury cases – e.g., those lacking sufficient evidence to establish specific causation – could now go before a jury and be compensable.").

> to create systems that would force settlements and penalize those defendants who chose trial by saddling them with onerous conditions.
>
> Many bankruptcies later, however, the new waves of asbestos litigation now reach out farther to more remote defendants, and often stretch proofs of exposure and causation in seeking to cast the broader liability net. The recent decisions [rejecting a duty to warn with respect to third-parties' asbestos-containing products] reflect that bedrock evidentiary and products liability principles and the policies that underlie them ought not be compromised even though the claim is labeled as one involving "asbestos."

Michael Hoenig, Commentary, *No Liability for Another's Asbestos Products*, N.Y.L.J., Feb. 17, 2012.

II. A DUTY TO WARN OF RISKS IN OTHERS' PRODUCTS IS UNSOUND POLICY

A. A Duty Rule Would Lead to a Flood of New Asbestos Cases, Unduly Pressure Remaining Defendants, and Fuel the Search for "Solvent Bystanders"

A flood of new cases could be expected if the Court affirms the Third Circuit's decision. Because the use of asbestos-containing products was so prevalent on ships for fireproofing (an important consideration at sea), many asbestos actions fall under maritime law.[16] Hundreds of companies made products that

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[16] *See* Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97 (2013) ("During World War II, the United States government used asbestos in Navy shipyards

arguably were used in the vicinity of asbestos-containing insulation or other asbestos-containing products. Many product manufacturers may have never sold a product containing an asbestos-containing component (*e.g.*, manufacturers of steel pipe and pipe hangers; makers of nuts, bolts, washers, wire, and other fasteners of pipe systems; makers of any equipment attached to and using the pipe system; and paint manufacturers), but they could potentially be held liable under the Third Circuit's decision.[17] Manufacturers and sellers of tools used with asbestos-containing materials, such as power saws, sanders, drills, hammers, or chisels, also could face liability.

Defendants would also face undue pressure because they would be required to shoulder the cost of harms caused by others' asbestos products in addition to those caused by their own products. Some companies could be forced into bankruptcy, like scores of other asbestos defendants that faced extreme liability.[18] So far, over 120 companies have

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when constructing and repairing ships for the war effort. The Navy became the country's largest consumer of asbestos, stockpiling and using it to prevent fires on the newly constructed combat vessels. During that period, the Navy employed approximately 4.5 million shipyard workers who potentially could have been exposed to asbestos fibers.").

[17] The Third Circuit identified factors for courts to consider in deciding whether liability can arise, such as whether the defendant's product was originally equipped with an asbestos-containing part that would eventually require replacement, such as a gasket, but made clear that these may not be the only facts on which liability can arise.

[18] *See* S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 306

declared bankruptcy due at least in part to asbestos-related liabilities.[19]

In addition, additional defendants would be pulled into the litigation as plaintiffs' attorneys expand their dragnet search for "solvent bystanders." *See In re Garlock Sealing Technologies, LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014) (describing how a gasket and packing manufacturer became a target of asbestos cases following the bankruptcy wave until the company was forced into bankruptcy partly because of manipulation of plaintiff exposure evidence).

It is also important to note that the asbestos litigation shows no sign of abating. A 2016 review of asbestos-related liabilities reported to the U.S. Securities and Exchange Commission by more than 150 publicly traded companies found that "[f]ilings remained flat at the levels observed since 2007...." Mary Elizabeth Stern & Lucy P. Allen, *Resolution Values Dropped 35% While Filings and Indemnity Payments Continued at Historical Levels* 1 (NERA Econ. Consulting June 2016). Another study found that mesothelioma claim filings have "remained near peak levels since 2000." Jenni Biggs et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013). "Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational expo-

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(2013) ("Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.").

[19] *See* Company Name and Year of Bankruptcy Filing (Chronologically), *available at* https://www.crowell.com/files/List-of-Asbestos-Bankruptcy-Cases-Chronological-Order.pdf.

sure to asbestos will continue for the next 35 to 50 years." *Id.* at 5.

Bankruptcies have terrible consequences for claimants, affected companies, workers, retirees, and communities.[20] Plaintiff recoveries are substantially delayed while companies are in bankruptcy.[21]

B. NON-ASBESTOS MARITIME TORT CASES WILL INCREASE

The duty created by the Third Circuit would also lead to new non-asbestos maritime tort filings since presumably the duty would extend to any product foreseeably used in conjunction with any hazard on a ship. For example, manufacturers of paint brushes may have to caution against the hazards of breathing mineral spirits that are commonly used to clean paint brushes. *See* Joseph W. Hovermill et al., *Targeting of Manufacturers*, 47 No. 10 DRI For Def. 52,

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[20] *See also* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51, 70-88 (2003) (exploring the effect of asbestos-related liabilities and bankruptcies on employment, retirement security, government finances, and other economic factors); Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 386 (1993) (bankruptcy puts substantial burdens on the "shareholders, employees, pensioners, and communities of asbestos defendants").

[21] *See* James Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 260-61 (2006) ("RAND looked at eleven major asbestos bankruptcies and found that the average duration between filing and plan confirmation (which is the earliest date payments could start) was six years. One case took ten years. During these periods the trusts pay no money to claimants. Furthermore, in the typical case plan confirmation itself can precede any payment by months, if not years, due to various startup delays.").

54 (Oct. 2005). Perhaps the only limit on such an expansive duty requirement would be the imagination of creative plaintiffs' lawyers.

C. THE DUTY WOULD BE ENDLESS AND UNPREDICTABLE

If a manufacturer's duty were defined by foreseeable uses of *other* products, the chain of warnings and liability would be endless and unpredictable. Manufacturers cannot be expected to have research facilities to identify potential dangers with respect to all products that may be used in conjunction with or in the vicinity of their own products. *See Taylor v. Elliott Turbomachinery Co., Inc.*, 90 Cal. Rptr. 3d 414, 422-23 (Ct. App. 2009) ("a bright-line legal distinction tied to the *injury-producing product* in the stream of commerce . . . acknowledges that overextending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution") (emphasis in original). Companies "might well face the dilemma of trying to insure against 'unknowable risks and hazards.'" *Id.* at 439 (citation omitted).

The unpredictability that would be created by the imposition of liability would make it harder for businesses to grow and create jobs. Commentators have observed with respect to asbestos litigation:

> The uncertainty of how remaining claims may be resolved, how many more may ultimately be filed, what companies may be targeted, and at what cost, casts a pall over the finances of . . . American businesses. The cost of this unbridled litigation diverts capital from productive purposes, cutting investment and jobs. Uncer-

> tainty about how future claims may impact their finances has made it more difficult for affected companies to raise capital and attract new investment, driving stock prices down and borrowing costs up.

George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 998 (2003).

D. Over-warning Could Undermine Consumer Safety

Consumer safety could be undermined by the potential for over-warning and through conflicting information that may be provided by manufacturers of different components and makers of finished products. *See* Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38, 43 (1983) ("The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . . ."). As the California Supreme Court said in *O'Neil*, "To warn of all potential dangers would warn of nothing." 266 P.3d at 1006 (citation omitted); *see also Straley v. United States*, 887 F. Supp. 728, 747 (D. N.J. 1995) ("Courts have held that it is unreasonable to impose a duty upon a manufacturer to warn of all possible dangers posed by all possible uses of a product because such 'billboard' warnings would deprive the user of an effective warning.").

E. A Duty Would Not Prevent Future Harm

Imposing liability on a defendant for others' post-sale use of asbestos-insulation or replacement parts

made by third-parties would not serve the policy of preventing future harm. As a California Court of Appeal explained:

> It is doubtful respondents had any ability to control the types of products that were used with their equipment so long after it was sold. They delivered various parts to the Navy during World War II and had no control over the materials the Navy used with their products twenty years later when [plaintiff] was exposed to asbestos. Indeed, imposing a duty to warn on respondents now will do nothing to prevent the type of injury before us – latent asbestos-related disease resulting from exposure four decades ago. Such exposures have already taken place, and in light of the heavily regulated nature of asbestos today, it is most unlikely that holding respondents liable for failing to warn of the danger posed by other manufacturers' products will do anything to prevent future asbestos-related injuries.

Taylor, 90 Cal. Rptr. 3d at 439.[22]

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[22] In 1972, the federal Occupational Safety and Health Administration ("OSHA") first issued permanent standards regulating occupational exposure to asbestos. *See* 29 C.F.R. § 1910.1001. "The 1972 OSHA regulations established standards for exposure to asbestos dust and mandated methods of compliance with the exposure requirements, including monitoring work sites, compelling medical examinations, and, for the first time, labeling products with warnings." *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 280 (4th Cir. 1993). After 1972, OSHA's asbestos regulations "became increasingly stringent over time" and most uses of asbestos ceased in the United States. *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 310 (E. & S.D.N.Y. 2002).

III. ASBESTOS TRUSTS PROVIDE AN ALTERNATIVE COMPENSATION SYSTEM FOR HARMS CAUSED BY BANKRUPT FORMER ASBESTOS PRODUCERS

Maritime law's solicitude for the safety and protection of sailors does not justify "robbing Peter to pay Paul," which is the consequence of the Third Circuit's ruling. *Billions* of dollars are available in trusts to pay asbestos claimants for harms caused by debtor companies that exited the tort system through bankruptcy.[23] *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011) ($36.8 billion in asbestos trusts as of 2011); Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* 2 (RAND Corp. 2011). To the extent Respondents' exposures to asbestos came from products made by bankrupt companies, the trusts provide a remedy. *See* William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675, 675 (2014) (trusts established in asbestos-related bankruptcy reorganizations "answer for the tort liabilities of the great

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[23] Section 524(g) of the Bankruptcy Code provides a mechanism for companies with asbestos-related liabilities to reorganize, channel their asbestos liabilities into trusts, and emerge from bankruptcy with immunity from asbestos-related tort claims. *See* 11 U.S.C. § 524(g); Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (RAND Corp. 2010).

majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades").

The asbestos trust system is non-adversarial; it is much easier and faster than bringing a lawsuit. *See* John J. Hare & Daniel J. Ryan, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: Refuting the Myths About Transparency*, 15-9 Mealey's Asb. Bankr. Rep. 1, 3 (2015) ("Plaintiffs' lawyers routinely advertise their ability to file trust claims 'quickly and easily,' and tell potential clients that paralegals evaluate potential trust claims and undertake the filing process. The evidence also demonstrates that trust claims are paid more quickly than tort claims."); Marc C. Scarcella & Peter R. Kelso, *A Reorganized Mess: The Current State of the Asbestos Bankruptcy Trust System*, 14-7 Mealey's Asb. Bankr. Rep. 32, 39 (2015) ("Unlike lawsuits filed in the tort system, the trust compensation process is intended to avoid the time, expense, and resource burden often associated with litigation.").

Further, because trust payment procedures are voted on "by the claimants through their attorneys, and the trusts often do not contest liability, it is much easier to collect against a bankruptcy trust than a solvent defendant." Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 The Advoc. (Tex.) 80, 80 (2007); *see also* Thomas M. Wilson, *Institutionalized Fraud in Asbestos Bankruptcy Trusts*, 29-7 Mealey's Litig. Rep.: Asb. 1, 6 (2014) ("the trusts, designed by the same individuals who are now submitting claims, contain 'loopholes' allowing for ease of

payment, often without the need for any real proof. By using the loopholes which have been integrated into the system itself, asbestos claimants can legitimately obtain compensation which they are otherwise precluded from obtaining in the tort system.").

To recover from an asbestos trust, a claimant files a short claim form which, among other things, "requires a statement of injury; information sufficient to establish asbestos exposure attributable to the trust's predecessor . . . and a determination as to whether the claimant is seeking expedited or individual review." S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 317-18 (2013).[24] The claimant will also submit evidence of exposure, such as a "work history, Social Security records, invoices, employer records, or deposition testimony of the claimant or coworkers taken in asbestos litigation," and "medical reports or records sufficient to support a diagnosis for the specific disease being claimed or, if applicable, a copy of a death certificate." U.S. Gov't Accountability Office, *supra*, at 18; *see also* Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1 ("Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far

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[24] For a representative trust claim form, see Manville Personal Injury Settlement Trust 2002 TDP Proof of Claim Form, http://www.claimsres.com/wp-content/uploads/2016/11/POC02V4.pdf.

quicker than a court proceeding and the process is less expensive for attorneys.").

If a trust determines that a claim meets the criteria required for payment, the trust will make an offer based on a percentage of the "scheduled value" for the alleged injury, as set forth on a grid. A recent deposition of the general counsel of the Manville Trust established that there is no backlog and that an offer can be made within days after submission. *See* Deposition of Jared Garelick, in *Cummings v. General Elec.*, No. 13-CI-006374 (Jefferson Ky. Cir. Ct. Dec. 14, 2015), at 34-36. After the offer is accepted, payments tend to be made quickly.[25]

It is common for claimants to receive multiple trust payments since each trust operates independently and workers were often exposed to different asbestos products. *See* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1078-79 (2014).

Trust payments in the aggregate can be substantial. In a recent bankruptcy case involving gasket and packing manufacturer Garlock Sealing Technologies, LLC, a typical mesothelioma plaintiff's recovery was estimated to be $1–1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." *In re Garlock Sealing Technologies, LLC*, 504 B.R. at 96.

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[25] The U.S. GAO estimates that approximately 97-98% of trust claims are processed on this expedited basis. *See* U.S. Gov't Accountability Office, *supra*, at 20. Only a tiny percentage of claimants seek individual review in the hopes of obtaining more compensation from the trusts. *See id.* at 554; Deposition of Jared Garelick, *supra*, at 37-38.

The Third Circuit's ruling would mean that in addition to the substantial recoveries available to maritime asbestos plaintiffs *today*—i.e., (1) payments from potentially multiple trusts for trust-related exposures and (2) tort actions against still-solvent defendants for exposures if connected to their *own* products[26]—plaintiffs would *also* have a tort remedy against additional defendants for asbestos-containing products they did not make or sell. This is unnecessary to meet maritime law's solicitude for the safety and protection of sailors.

CONCLUSION

For these reasons, *amici* urge the Court to reverse the Third Circuit's decision and affirm the District Court's grant of summary judgment in favor of Petitioners.

Respectfully submitted,

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[26] *See* Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* iii (RAND Corp. 2015) ("Plaintiffs now often receive compensation both from the trusts and through a tort case."); *see also* U.S. Gov't Accountability Office, *supra*, at 15 ("Although 60 companies subject to asbestos-related liabilities have filed for bankruptcy under Chapter 11 and established asbestos bankruptcy trusts in accordance with § 524(g), asbestos claimants can also seek compensation from potentially liable solvent companies (that is, a company that has not declared bankruptcy) through the tort system.").

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